IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1345 OF 2004

A.Kadar Shamsuddin Munshi & ors. ... Appellants.

Versus.

Khutunbi Kamruddin Munshi & anr. ... Respondents.

Shri Khaiyan Shaikh i/by Ms.Anamika Malhotra for the Appellants.

Shri S.A.Sawant for the Respondents Nos.1 & 2.

CORAM : ABHAY S. OKA, J.

DATED : 31st March, 2005.

P.C.:

1. Admit. Shri Sawant waives service for the Respondents. The following substantial question of law arises in the Second Appeal :

(i) Whether the Appellate court has committed an error by not deciding the issue of bar of limitation specifically urged by the Appellants ?

2. By consent taken up for hearing forthwith.

3. The Appellants are the original Defendants. The suit filed by the Respondents was decreed by the trial Court by declaring that the Respondents have 1/2th share jointly in the suit property and they are entitled to partition and separate possession of their share. The

trial Court held that the gift dated 3rd March 1927 is null and void and accordingly oral gift executed by Nurruddin is null and void. An appeal was preferred by the Appellants herein to the District Court. The Appeal has been dismissed.

4. The learned Counsel appearing for the Appellants submitted that a specific contention was raised before the Appellate Court that the challenge to the gift dated 3rd March 1927 was barred by limitation. The learned Counsel submitted that in fact amendment to the plaint was itself barred by limitation. He submitted that though plea of bar of limitation was raised specifically before the Appellate Court while deciding the Appeal, the said plea is not dealt with.

5. The learned Counsel appearing for the Respondents submitted that the finding of the trial Court is that the gift of the year 1927 was void and therefore, consequently the subsequent gift dated 22nd June 1960 is also illegal. He submitted that as the gift was void, the law of limitation will not apply.

6. I have considered the rival submissions. It is pertinent to note that the Judgment of the Appellate Court shows that a specific contention was raised on behalf of the Appellants that the suit filed by the Respondents was barred by limitation. The specific

contention is noted by the Appellate court in paragraphs 13 and 16 of the Judgment. A perusal of the Judgment of the Appellate Court shows that the contention based on bar of limitation is not dealt with by the Appellate Court. When the said contention was raised it was necessary for the Appellate Court to deal with the same as the Appellate Court is the final Court of facts. Only on this ground the impugned Judgment and Decree of the Appellate Court deserves to be quashed and set aside.

7. Hence the following order:

(i) The impugned Judgment and Decree dated 4th October 2004 is quashed and set aside and Civil Appeal No.62 of 2002 is restored to file.

(ii) The parties will appear before the learned Joint District Judge, Ratnagiri on 25th April 2005 for fixing the date of hearing. It is made clear that no notice will be issued to the parties by the District Court of the date fixed for hearing.

(iii) The learned Joint District Judge, Ratnagiri, is directed to hear and decide

the Appeal as expeditiously as possible in the light of the observations made in this Judgment and in any event on or before 31st October, 2005.

(iv) All contentions of the parties on merits are expressly kept open.

(v) The Appeal is partly allowed in the above terms with no order as to costs.

(vi) The parties and the Appellate Court will act on an authenticated copy of this order.

Judge.